

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DANIEL KLEEBERG, LISA STEIN, and
AUDREY HAYS,

Plaintiffs,

v.

LESTER EBER; ALEXBAY, LLC f/k/a
LESTER EBER, LLC; ESTATE OF
ELLIOTT W. GUMAER, JR.; and WENDY
EBER,

Defendants,

and

EBER BROS. & CO., INC.; EBER BROS.
WINE AND LIQUOR CORP.; EBER
BROS. WINE & LIQUOR METRO, INC.;
EBER-CONNECTICUT, LLC; EBER-
RHODE ISLAND, LLC; EBER BROS.
ACQUISITION CORP.; EBER-METRO,
LLC; SLOCUM & SONS OF MAINE, INC.;
and CANANDAIGUA NATIONAL BANK
& TRUST COMPANY,

Nominal Defendants.

Civil Action No. 16-CV-9517(LAK)(KHP)

**DECLARATION OF BRIAN C. BROOK IN SUPPORT OF PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT**

1. I, Brian C. Brook, am an attorney licensed to practice law in the State of New York and in this Court, among other jurisdictions. I am the principal of the law firm of Brook & Associates, PLLC, and have been counsel of record for the Plaintiffs in the above-captioned case since its initial filing in December 2016.

2. I submit this declaration and the exhibits attached hereto in support of Plaintiffs' Motion for Partial Summary Judgment.

3. The following pages contain an Exhibit List with exhibits that are described in a manner that is generally true and accurate to the best of my knowledge, information, and belief.

4. Exhibits 1 through 131 were previously marked during depositions conducted by Plaintiffs in this matter, and the exhibit numbers have been retained in order to facilitate a clear reading of the record. Unless otherwise expressly stated, all references in Plaintiffs' moving papers to any "Exhibit" is a reference to Plaintiffs' Exhibits as specified in the depositions and on the attached list.

5. Only those exhibits that are relied on or which we expect to potentially rely on in reply are included on the Exhibit List and being filed. Accordingly, there are numerous numerical gaps in the list. For the electronic filing, each PDF containing multiple exhibits has PDF bookmarks to allow easy navigation to specific exhibits. Each exhibit is also labeled on its first page with a yellow "Plaintiffs' Exhibit" tag.

6. Exhibits numbered 132 and higher are documents that were not marked during deposition examinations conducted by Plaintiffs. Exhibit 139 was produced to Plaintiffs on August 22, 2019, the evening before the deposition of Defendants' Expert Frank Torchio. These revised exhibits to his report were referenced during his deposition as the "revised" exhibits, but it does not appear that the revised exhibits themselves were marked as an exhibit on their own.

7. It should be noted that, as to certain documents, Plaintiffs will contend at trial that the documents contain false information, particularly with respect to dates, as the evidence adduced shows that backdating documents by days, weeks, and sometimes months was rampant. We have reason to believe that at least one document produced very late in discovery (Exhibit 115) was aggressively backdated more than two years in order to plug a hole in the challenged corporate actions of February 2017. Defendants have refused Plaintiffs' repeated requests to produce metadata or native format files to verify the dates and other information appearing on

the face of questionable documents. Obviously, this Court cannot infer malintent at this stage, but I mention this so that it is clear that Plaintiffs are not adopting the descriptions of the documents or the truth of the information therein for any purpose beyond the instant motion for partial summary judgment. Plaintiffs reserve the right to dispute the very same documents, to the extent necessary, in their oppositions to Defendants' summary judgment motions, and certainly later at any trial or evidentiary hearing.

8. Defendants failed to produce a copy of the Bylaws of Eber Bros. & Co., Inc. ("EB&C") in discovery at the same time they produced other corporate governance documents. A copy of the Bylaws was first provided to Plaintiffs by email from Lester Eber's counsel of record to me on October 2, 2018.

9. In accordance with the Bylaws provided, Audrey Hays requested a special meeting of the shareholders on October 10, 2018, but defense counsel advised that the Ebers refused to acknowledge Audrey Hays as a shareholder.

10. On October 26, 2018, I sent an email to Paul Keneally and his colleagues in which I forwarded a copy of the October 11, 2017 letter from CNB's counsel to me and Lester's counsel, Plaintiffs' Exhibit 38, including its attached copies of stock certificates and stock powers that had been purportedly executed by CNB on October 2, 2017.

11. On October 31, 2018, I received the email and attached "Notice of Intent to Purchase" that has been marked as Plaintiffs' Exhibit 35.

12. On December 3, 2018, I filed on ECF a redline of the proposed Third Amended Complaint against the filed Second Amended Complaint. I forwarded that redline to Lester Eber's counsel, John Herbert, later that same day. In the proposed Third Amended Complaint, Plaintiffs contended that the October 31, 2018 "notice of intent to purchase to CNB was ineffective [] because it failed to indicate that Lester would pay a price equal to the book value of the shares. Such information was required to be included in the notice." ECF No. 166-1 ¶317.

13. On December 17, 2018, John Herbert emailed to Rita Nischal of CNB, copying me and the Ebers' counsel of record, correspondence purporting to supplement the "Notice" that was sent on October 31, 2018 by adding the missing information that Plaintiffs had identified in their proposed pleading. A true and correct copy of Mr. Herbert's email attachment is marked as Plaintiffs' Exhibit 164.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Dated: November 8, 2019

/s Brian C. Brook
Brian C. Brook

Plaintiffs' Exhibit List | Kleeberg v. Eber, 16-cv-9517

EX #	DESCRIPTION	DATE
1	Internal Canandaigua National Bank ("CNB") Email re Eber Account	Sent 11/22/2006
2	Email from Wendy Eber to Rick Hawks, CNB, re: Annual Letter	Sent 12/02/2009
4	Letter from CNB to Audrey Hays	Dated 12/18/2012
5	Letter from CNB to Audrey Hays	Dated 12/23/2013
6	Email from Wendy Eber to Lester Eber attaching for his review draft "Minutes from Meeting of Trustees of the Trust of Allen Eber June 7th" 2012	Sent 1/02/2013
8	Lester Eber's Notarized Affidavit	Signed 12/08/2011
9	Letter from Richard Hawks (CNB) to Lester Eber and Elliott Gumaer re: Allen Eber Residuary Trust	Dated 2/24/2016
11	Chart of Corporate Structure of EBWLC and Operating Affiliates as of 2009	Undated
12	Wendy Eber's "Summary of Lester Eber's Payments for Liabilities of EBER Bros. W and L Corp."	Undated
13	Line of Credit Note from Eber Metro to Lester Eber	"October __, 2009"
14	Polebridge Bowman Stock Purchase Agreement with Eber Metro	"as of" 5/30/2010
15	Security Agreement between EBWLC, Eber Metro, and Lester Eber	"as of" 2/26/2010
16	Line of Credit Note from Eber Metro to Lester Eber	Dated 2/26/2010
17	Debt Assumption Agreement between EBWLC and Eber Metro	"as of" 2/11/2011
18	Amended and Restated Security Agreement between EBWLC and Eber Metro "in favor of" Lester Eber	"as of" 2/11/2011
19	Minutes of EBWLC 8/18/2011 Board Meeting	Undated
21	Gumaer Resignation from EB&C, Eber Metro, and Eber-CT	Scanned 2/7/2017
27	Consulting Agreement between Southern Wine & Spirits and Lester Eber	Effective 8/30/2007

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EX #	DESCRIPTION	DATE
28	W-2s Issued to Lester Eber for 2006 to 2009, and 2011 to 2017	Various
29	Letter Agreements between Southern Wine & Spirits and Lester Eber	Various from 2012 to 2016
30	Amended and Restated Promissory Note	"as of" 3/13/2006
31	Alexbay, LLC Business Details and Name Change History from Connecticut Secretary of State	Accessed 10/1/2016
32	Letter from Rita Nischal, Esq. (CNB) to Lester Eber	Dated 7/12/2017
33	Order for Judicial Settlement of Final Account of Co-Trustee	6/1/2017
34	Letter from James G. Vazzana, Esq. to Rita Nischal	7/19/2017
35	Email from Paul Keneally attaching Notice of Intent to Purchase Shares from Lester Eber to Allen Eber Trust c/o CNB	Sent 10/31/2018
36	Proposed Distribution of Securities from Allen Eber Trust	Revised 9/2017
37	Email from James Vazzana to Rita Nischal	Sent 9/15/2017
38	Letter from Larisa LaRocca to James Vazzana and Brian Brook	Dated 10/11/2017
40	Email from James Vazzana to Lorisa LaRocca	Sent 6/2/2017
41	Email from James Vazzana to Lorisa LaRocca	Sent 8/18/2017
42	Letter from Audrey Hays to Wendy and Lester Eber	Sent 10/10/2018
43	Written Consent of the Sole Member of EBWLC BOD; Stock Issuance to Lester Eber; EBWLC Certificate of Incorporation Amendment; Written Consent of EB&C as shareholder of EBWLC	"as of" 2/14 and 2/15/2017
44	Alexbay v. EBWLC et al. Summons and Complaint	Filed 2/21/2012
45	Affidavit of Lester Eber in Support of Motion for Judicial Determination of 'Commercial Reasonableness' Under UCC 9-627	Signed 3/14/2012
46	Affidavit of Lester in Harris Beach v. EBWLC et al., No. 2014-13623	Signed 6/24/2015

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EX #	DESCRIPTION	DATE
47	Engagement Letter Agreement between Elliott Gumaer and Lester Eber	Dated 1/2/2001 and stamped 1/8/2001
48	Email from Elliott Gumaer to Wendy and Lester Eber re: Compensation	Sent 10/29/2013
49	Letter from Lester Eber to Sally Kleeberg re: Loan (without enclosures)	Dated 4/2/2010
55	Slocum of Maine Call Option Exercise Letter	Dated 7/_/2012
56	Letter Agreement between EBWLC and Eder-Goodman, LLC re Sale of Interest in Eber-CT	Dated 1/29/2008
57	Amended and Restated LLC Agreement of Eber-CT	"as of" 4/1/2008
59	Alexbay's Notice to EBWLC of Proposal to Accept Collateral in Full Satisfaction of Debts Owed by Eber Metro	Dated 1/_/2012
60	Board Meeting Minutes	Various
61	Unanimous Written Consent of the Board of Directors of EBWLC to transfer Eber Metro to Alexbay	Signed 6/9/2012
62	Eber Metro Stock Certificate Issued to Alexbay, signed by Lester Eber as President of Eber Metro	Dated 6/5/2012
63	Agreement for Turnover and Acceptance of Eber Metro Pursuant to N.Y. U.C.C., signed by Lester for Alexbay and Wendy for EBWLC and Metro	Dated 6/5/2012
67	Emails from Gumaer to Lester and Wendy Eber re: Trustee Compensation	4/11 & 6/28/2014
74	Affidavit of Confession of Judgment, Teamsters v. EBWLC	Signed 8/1/2012
77	Unanimous Written Consent of Board of Directors of EBWLC re: Lester Eber Resignation and Appointment of Wendy Eber as President	"as of" 2/28/2012 but faxed 3/26/2012
86	Letter from James Vazzana to Lorisa LaRocca re Lester Eber / Trust	Dated 3/28/2017
88	Wendy Eber Amended Responses Daniel Kleeberg's First Set of Interrogatories	Dated 7/26/2018

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EX #	DESCRIPTION	DATE
93	Letters from Wayne Chaplin, President of Southern Wine & Spirits, to Lester Eber, President of EBWLC	3/14/2007 and 2/7/2007
98	Email from Wendy Eber to Elliott Gumaer attaching Letter dated 11/7/2012 from Underberg & Kessler re Alexbay's loans	Sent 12/13/2012
101	Email from Lester Eber to Elliott Gumaer re: attending meeting and speaking with Richard Hawks of CNB	Sent 3/2/2012
102	Emails between Elliott Gumaer, Wendy Eber, and Lester Eber	Sent 3/9/2012
107	Ebers' Amended Answer to Third Amended Complaint ("TAC")	Filed 6/24/2019
108	Bylaws of EBWLC	Undated
109	Email and Attachments drafted by David Belt, Esq. for Lester Eber	1/18/2012
110	Lester Eber Deposition Day One Errata Sheet	Signed 3/8/2019
112	Email from Wendy Eber to Lester Eber's assistant supplying responses to questions from David Belt re: Lester's loans	Sent 10/5/2011
114	Email from Wendy Eber to David Belt, Esq. re Lester Eber Loan Balances and Interest	Sent 1/18/2012
115	Unanimous Written Consent of the Members of the Board of Directors of EB&C	"as of" 2/14/2017
117	Email from Wendy Eber to Lester Eber, Elliott Gumaer, and Glenn Sturm re Minutes to Board Meeting	Sent 3/4/2010
119	Email from Elliott Gumaer to Wendy Eber re Wendy taking first right of first refusal to Polebridge Bowman's 6% interest in Eber-CT (forwarded to Harris Beach attorneys), and attaching Memorandum from Glenn Sturm	Gumaer email sent 5/26/2010; Memo dated 5/26/2010
120	Email from Wendy Eber to Elliott Gumaer attaching a Unanimous Written Consent in Lieu of Meeting of the Board of Directors of Eber Metro dated May 28, 2010 but not yet signed by Gumaer	Sent 7/29/2010
122	Email from Elliott Gumaer to Wendy Eber re Alexbay matter	Sent 3/13/2012

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EX #	DESCRIPTION	DATE
123	Email from Wendy Eber to Marino Fernandez attaching documents re: CNB's loan to Eber-CT	Sent 3/12/2012
126	Expert Report of Frank Torchio	Served 6/28/2019
127	Expert Report of Glenn Liebman	Served 7/26/2019
132	Allen Eber's Will (the Trust instrument)	Signed 10/27/1969
133	Bylaws of Eber Bros. & Co., Inc. ("EB&C")	Undated
134	EB&C Stock Certificates Issued to the Trustees	Issued 5/10/1991, 12/2/1997, and 9/6/1989
135	CNB's Petition for Judicial Settlement of Final Account of Co-Trustee, Resignation and Discharge of Co-Trustee and Termination of Trust (Relevant Excerpts Only; Ex. A (Empire Valuation) Omitted)	Filed 2/15/2017
136	Email from Wendy Eber to James Vazzana attaching Empire Valuation's Appraisal of EBWLC; forwarded to CNB's outside counsel	Sent 1/27/2017
137	Notice of Appearance of James G. Vazzana, of Wiedman, Vazzana, Corcoran & Volta, P.C., on behalf of Lester Eber in the Final Accounting of CNB Matter (with Cover Letter and Email)	Sent 3/14/2017; Signed by Lester Eber 3/13/2017
138	Appointment of CNB as Trustee of the Trust	Dated 7/23/2007
139	Revised Torchio Report Exhibits	Produced 8/22/2019
140	Guaranty of EBWLC "in favor of" Lester Eber	"as of" 2/26/2010
141	Lester Eber's 2nd Amended Responses to Lisa Stein's First Set of Interrogatories	Dated 7/26/2018
142	Lester Eber's 2nd Amended Responses to Daniel Kleeberg's First Set of Interrogatories	Dated 7/26/2018
143	Letter from Paul Keneally to Daryoush Behbood	Sent 8/17/2018
144	Eber Defendants' Responses to Audrey Hays' Second Set of Interrogatories	Verified 8/27/2018

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EX #	DESCRIPTION	DATE
145	Lester Eber's Responses to Daniel Kleeberg's Second Set of Interrogatories	Verified 8/27/2018
146	Wendy Eber's Responses to Lisa Stein's First Set of Interrogatories	Signed 8/28/2018
147	Letter from Paul Keneally to Brian Brook re Interrogatory Supplements	Sent 12/14/2018
148	Responses to Hays' Contention Interrogatories	Dated 9/13/2019
149	Responses to Stein's Contention Interrogatories	Dated 9/13/2019
151	Stand-Alone Restricted Stock Award Agreement and Employment Agreement between Wendy Eber and Eber Metro and Eber-CT	Effective "as of" 8/14/2012
152	Resolutions of the Board of Directors of EBWLC	Dated 2/26/2010
153	Email from Wendy Eber to Richard Hawks	Sent 12/15/2016
154	Board Authorizing Resolution re: Transactions with Southern Wine & Spirits	Dated 8/___/2007
155	EBWLC Form W-2 to Lester Eber	Calendar Year 2010
156	Emails between Richard Hawks, Lester Eber, and Elliott Gumaer re: Lisa Kleeberg Stein Financial Request	9/1 to 9/6/2011
157	Letters from Richard Hawks (CNB) to Sally Kleeberg, Lester Eber, and Wendy Eber re Distribution to Erica Stein	Dated 9/20/2011
158	Audited Financial Statement for Eber-CT 2011 and 2012	Dated 2/4/2013
159	Stipulation between Alexbay, EBWLC and Eber Metro re "no objection" to conveying Eber Metro to Alexbay	Signed 3/9/2012
160	EBWLC General Ledger Page 76, reflecting Legal and Accounting Expenses in Winter and Spring 2012	Redacted by Defs.
161	Letter from Richard Hawks (CNB) to Audrey Hays, enclosing Letter from Lester Eber dated 12/15/2009	Dated 12/18/2009
162	Closing Index to Harris Beach's Transaction Binder for Eber Bros. -- Southern Wine & Spirits Transactions	Undated

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EX #	DESCRIPTION	DATE
163	Alexbay Notice to Eber Metro of Proposal to Accept Collateral In Full Satisfaction of Debts, and Notice to Teamsters	Faxed 1/18/2012 and Delivered 1/19/2012
164	Follow-up Correspondence from Lester Eber to Allen Eber Trust c/o CNB re [Exhibit 35]	Signed and Sent 12/17/2018
176	Deposition of Lester Eber (excerpts from both days)	Deposed 1/23/2019 and 6/27/2019
177	Deposition of Wendy Eber, individually (excerpts from both days)	Deposed 2/28/2019 and 6/28/2019
178	Deposition of Eber Metro per FRCP 30(b)(6), with Wendy Eber as corporate designee (excerpts from both days)	Deposed 1/24/2019 and 2/27/2019
179	Deposition of Eber-CT per FRCP 30(b)(6), with Wendy Eber as corporate designee	Deposed 2/27/2019
180	Deposition of Richard Harris Hawks, Jr. (excerpts from both days)	Deposed 8/20/2018 and 4/11/2019
181	Deposition of Southern Glazer's Wine & Spirits, LLC per FRCP 30(b)(6), with Lee Hager as corporate designee	Deposed 5/9/2019
182	Deposition of Frank C. Torchio	Deposed 8/23/2019
190	Declaration of Audrey Nan Hays	Signed 11/4/2019
191	Declaration of Lisa Stein	Signed 11/8/2019
192	Declaration of Daniel Kleeberg	Signed 11/8/2019